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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY WILLIAMS,

Defendant and Appellant.

B200415

(Los Angeles County
Super. Ct. No. NA065327)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Bradford L. Andrews, Judge. Reversed with directions.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General,
Steven D. Matthews, and David E. Madeo, Deputy Attorneys General, for Plaintiff
and Respondent.

Appellant Anthony Williams appeals from the trial court's order finding him in violation of his probation and imposing a three-year suspended prison sentence. Appellant contends that the trial court abused its discretion and denied his due process and equal protection rights when it found him in violation of his probation and imposed the suspended prison sentence without considering alternative forms of punishment. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On April 13, 2005, appellant was charged in count 1 with second degree robbery in violation of Penal Code section 211¹ arising out of the following facts. On April 11, 2005, appellant entered a Rite Aid drugstore and removed some pills from a bottle and placed the contents in his pocket. When he was detained by store security he attempted to flee and was wrestled to the ground. On April 21, 2005, following advisement and waiver of his constitutional rights, appellant entered a plea of no contest to one count of grand theft person (§ 487, subd. (c)), which was added as count 2 to the felony complaint. The robbery count was dismissed in accordance with the plea agreement. The trial court suspended imposition of sentence and placed appellant on formal probation for three years on conditions including that he serve 15 days in county jail with credit for 15 days time served; complete 30 days of Caltrans community service; regularly report to the probation department; arrange and submit to narcotics testing; cooperate with the probation officer in a plan for substance abuse therapy; pay a \$200 restitution fine and a probation revocation fine suspended; pay the costs of probation in accordance with his ability to pay; and obey all laws.

On March 22, 2006, appellant admitted violating his probation. The trial court revoked, reinstated, and continued probation on the same terms and conditions. On October 5, 2006, appellant failed to appear for a hearing on a

¹ All further statutory references are to the Penal Code unless otherwise indicated.

possible probation violation. Probation was revoked and a bench warrant was issued for appellant's arrest. On November 29, 2006, appellant was picked up on the bench warrant, and the case was set for a probation violation hearing on December 20, 2006. On December 20, 2006, appellant admitted violating his probation and, in lieu of serving a 16-month sentence, agreed to remain on probation in exchange for a suspended three-year prison sentence. Probation was reinstated on the modified term that appellant serve the upper term of three years in state prison, with execution of sentence suspended. Appellant was also ordered to serve 36 days in county jail and received credit for time served.

On May 22, 2007, appellant's probation was revoked on the grounds that he failed to complete 30 days of Caltrans community service and failed to cooperate with the probation officer in a plan for substance abuse counseling. At the probation violation on hearing on June 12, 2007, appellant's probation officer, Valerie Kane (Kane) testified that as of that date, appellant had not completed his Caltrans program. She stated that appellant had reported to her regularly since January 2, 2007, and that each time she reminded him of his Caltrans and substance abuse counseling probation conditions. Kane represented that appellant had an indifferent attitude to completing the programs, telling her that he had neither the time nor the money. She also testified that appellant had not shown her any pay stubs or documents proving that he was seeking employment. She testified that if appellant did not have any money, it was up to him to work out some type of payment arrangement with the Caltrans volunteer center himself. Kane said that appellant never attempted to give her his school schedule verifying that he was enrolled, or the job search list. She did recall that appellant wore a National Institute of Technology (NIT) shirt, but she did not consider it proof of attendance at the school.

Appellant testified that he told Kane he had no money because he lost his job after he got out of jail. He attempted to show Kane a schedule of job applications and a letter indicating that he had passed the test for a custodian and a

handyman, but she would not take the documents, saying ““I don’t need to see this. This has no meaning to me.”” When he tried to explain his attempts to obtain employment, Kane brushed him off. Appellant also testified that because he was unable to obtain employment, he decided to learn a trade. He attended NIT for auto mechanics from 7 a.m. to 11 a.m., attended an unpaid apprenticeship after school until 6:30 p.m., and completed the apprenticeship program. He started a paying job a month prior to the May 22, 2007, hearing. He testified that Caltrans office personnel told him that he had to pay \$50 to enroll in the Caltrans program. When he told Kane he did not have the money to enroll in the Caltrans program, she told him that he needed to get a job. It cost \$350 to enroll in the counseling program. When he reported to Kane that he did not have the money to enroll in the counseling programs, she again told him to get a job. A week after he started his job, he was arrested.

The trial court received into evidence a letter from NIT establishing appellant’s enrollment in the school, a job search list, and examination results from the City of Torrance, dated March 29, 2007, placing appellant 24 on the eligible list for a custodian position.

The trial court found appellant in violation of his probation, and concluded that he had not made any attempts to inform Kane of his employment or enrollment in school and had not complained about his inability to enroll in the counseling or Caltrans programs for lack of funds. The trial court opined that Kane could have referred him for financial evaluation or to the court for a fee waiver, had he inquired. The trial court accepted appellant’s representation that he was currently employed but concluded that appellant’s attitude about probation was cavalier. The trial court based its conclusion on its previous experience with Kane, commenting that she is "too conscientious from my experience with her regarding the time and effort that she puts into the persons that she supervises just to ignore any progress that he has made or to reject any offer of any progress he has made.”

The trial court found appellant in violation of probation and imposed the previously suspended three-year prison sentence for grand theft. Appellant received 83 days of custody credit.

DISCUSSION

The trial court abused its discretion in revoking probation

Appellant contends that the trial court abused its discretion by finding him in violation of his probation based on his failure to complete the Caltrans community service and counseling programs. He claims he was unable to pay the fees required to enroll in the programs. He also contends that the trial court abused its discretion because it failed to consider alternative forms of punishment short of prison before revoking appellant's probation. We conclude the trial court abused its discretion.

Section 1203.2, subdivision (a), provides that a court is authorized to revoke probation if the interests of justice so require and the court, in its judgment, has reason to believe that the person has violated any of the conditions of his or her probation. (*People v. Jackson* (2005) 134 Cal.App.4th 929, 935.) Probation revocation decisions are reviewed under an abuse of discretion standard and the facts supporting revocation of probation may be proven by a preponderance of the evidence. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981–982.) But the evidence must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation. (*Ibid.*)

In *People v. Zaring* (1992) 8 Cal.App.4th 362, 375, the Fifth District concluded that the trial court abused its discretion by revoking the defendant's probation where the defendant was 22 minutes late to an 8:30 a.m. hearing because her child care arrangements fell through. Assuming the trial court's order to be on time for the hearing was the condition of probation, the appellate court determined that the defendant's tardiness was not the result of irresponsibility, contumacious behavior, or disrespect for the orders of the court, but was based on a last-minute unforeseen circumstance as well as a parental responsibility, and

concluded that the defendant's conduct was not a willful violation of the trial court's order. (*Id.* at p. 379.) The appellate court concluded that the trial court had abused its discretion which is predicated on reason and law, but is primarily directed to the necessary end of justice. (*Ibid.*) Similarly, in *People v. Galvan*, *supra*, 155 Cal.App.4th at p. 984, Division 3 of this appellate district concluded that a defendant's failure to report to probation within 24 hours of his release from county jail did not constitute a willful probation violation because he was immediately deported to Mexico following his release from county jail. Because the defendant's deportation obviously prevented him from reporting in person, his failure to report was not the result of irresponsibility or disrespect for the orders and expectations of the court. (*Id.* at p. 985.) Accordingly, Division 3 held that the trial court's revocation of the defendant's probation was an abuse of discretion because his failure to comply with a reporting condition had not been willful.

We conclude that the trial court abused its discretion in finding appellant in violation of probation and imposing the suspended three-year sentence, because the trial court rejected written documentation which it received into evidence at the hearing outlining appellant's efforts to obtain employment and enrollment at NIT, as well as appellant's testimony, in favor of the trial court's past experience with Kane. The record contains a letter written on May 9, 2007, from appellant to the trial court explaining that he was being denied employment based on his incarceration, and attaching letters from potential employees denying him employment. His letter to the trial court explained that he enrolled in a trade school for auto mechanics, but continued to report to his probation officer for testing. The record also shows a letter from NIT dated May 31, 2007, indicating that appellant was enrolled in the automotive program, that he was a hard worker, and that continued incarceration would cause him to be dropped from the program. Additionally, an unofficial transcript from NIT dated January 22, 2008, is contained in the record indicating that appellant was a student from March 12, 2007, to June 11, 2007. The record also reflects a notification of

examination results from the city of Torrance for a custodian position placing appellant in number 24 on the eligible list, dated March 29, 2007, and a job search list showing that appellant had applied for nine positions from January through March 2007.

Yet, despite the documents which the trial court received into evidence at the hearing, as well as the trial court's belief that appellant was currently employed, the trial court found appellant in violation of probation simply because Kane testified that appellant had not kept her informed of his job search status. What is troubling is that the trial court ignored the record and appellant's testimony, instead basing its decision primarily on its past experience with Kane. And, even though Kane had testified that appellant had told her he had neither the time nor the money to enroll in the Caltrans program, and appellant informed the trial court in his May 9, 2007, letter of his inability to obtain employment which was "hindering [him] from complying with all the stipulations of [his] probation agreement," the trial court still appeared to put the onus of requesting a fee waiver on appellant. While technically appellant had not completed his Caltrans community service and counseling programs, the record shows that he was doing everything possible to secure training and employment so that he could pay for the courses. His failure to comply was not simply due to contumacious behavior or disrespect but was caused by his financial inability to pay. And, the record shows that appellant had complied with all the other conditions of probation including serving jail time, drug testing, and regularly meeting with his probation officer. We conclude that appellant's failure to complete 30 days of Caltrans community service and a substance abuse counseling program was not a willful violation and the trial court abused its discretion in revoking probation.

In light of our conclusion that the trial court abused its discretion in revoking probation, we need not address appellant's further argument that he was denied his due process and equal protection rights by the trial court's imposition of

the suspended prison sentence and failure to consider alternative forms of punishment.

We conclude that the trial court abused its discretion in finding appellant in violation of probation, denying probation, and imposing the suspended three-year sentence. While the result of our order directing the trial court to act aside the orders revoking and denying probation and imposing the suspended sentence is that appellant will have to complete the Caltrans and substance abuse programs, the three-year sentence shall be stricken so that appellant will not have a criminal record showing that he served a prior prison term.

DISPOSITION

The judgment is reversed, with directions to the trial court to set aside the orders revoking and denying probation and imposing the suspended sentence, and to inquire into the necessity of a fee waiver on behalf of appellant.

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_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST